95-4261

No. _____

Supreme Court, U.S.
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In the
SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1994

CAROL RUTH DENNEY,
Petitioner,
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the First Appellate District

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PETITION FOR A WRIT OF CERTIORARI

CAROL R. DENNEY
1370 San Pablo Ave., #4
Berkeley, CA 94702
Tel.: (510) 548-1512

QUESTION PRESENTED

Whether the protection from a defamation suit accorded by this court's rule in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny, should be extended to a public entity and its employees acting in their official capacities who are sued by an alleged limited public figure plaintiff and critic of the public entity's policies.

PARTIES

The following are parties to this action: Petitioner, Carol Ruth Denney and respondents, The Regents of the University of California, Daniel Boggan, Jr., Jesus Mena, Christine Helwick and Milton Fujii.

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PETITION FOR A WRIT OF CERTIORARI

Carol Ruth Denney respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California for the First Appellate District in which that court affirmed the availability of the protection of this court's ruling in *New York Times v. Sullivan* to state public entities and their employees.

OPINIONS BELOW

The opinion of the court of appeal is reported at 28 Cal.App.4th 1251 and 34 Cal.Rptr.2d 188 [App., *infra* at 4]. The opinion of the Superior Court of the State of California is unreported [App., *infra* at 1].

JURISDICTION

The court of appeal entered its judgment on September 30, 1994. The California Supreme Court denied petitioner's timely petition for review on December 22, 1994 (App. 38). Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution which states, in pertinent part, that "Congress shall make no law . . .abridging the freedom of speech. . .or the right of people peaceably to assemble, and to petition the government for a redress of grievances" which applies to the states through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Background

This case arises from a land use controversy. In the 1960s, the University of California acquired by eminent domain a 2.8 acre parcel near its campus in Berkeley, destroyed all improvements on the property and then left it vacant for several years.

In 1969 community residents decided, rather spontaneously, to convert the vacant land into a

park.[1] Concededly, this was accomplished without the University's consent. The community developers brought trees, plants, flowers and grass and added other amenities including pathways and benches.

Then-Governor Ronald Reagan responded by declaring martial law and calling in national guard and other reinforcements. One person was shot and killed and several others were injured in police shootings during the demonstrations that followed. Ultimately, this military approach was unsuccessful.

Since that time the land has been known as "People's Park" and it remains open space, in the otherwise densely populated south campus area.

By the 1980s the Park had become a refuge for the homeless and the University declared its concern that the condition of the Park had deteriorated. The University then entered into an agreement with the City of Berkeley for joint management of the property under a five year lease arrangement.

In an effort to move the park away from homeless use and toward recreational uses that might attract students and others, the University designed a plan to build sand volleyball courts and other facilities. At the same time, the University sought to impose and enforce rules to discourage continued use by the

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The University stated that it bought the land with the intention to build student housing, but this never took place either because of a lack of funds or intense community opposition, or both.

homeless.

This scheme to gentrify the park enraged a large segment of the community.[2] The ensuing controversy culminated in street battles between demonstrators and police in the weeks that followed construction. The redwood perimeter of the newly-constructed volleyball courts was vandalized on repeated occasions.

II. Proceedings Below

In January, 1992, the University filed in the Alameda County Superior Court an action for trespass, nuisance and other torts against petitioner, three other activists, and an amorphous entity identified as the "People's Park Defense Union" alleging that the defendants had interfered with use of the Park and that they were responsible for damage to Park facilities (App. 7). The Regents sought and obtained a temporary restraining order (TRO) (*Id.*).[3]

2

Opponents criticized the University's plan because it violated the principles of "user development", open space and free speech, on which the Park was founded. User-development is the idea that the future of the Park should be determined by Park users rather than the University. Other complaints were that the proposed sports facilities would eat up precious open space already dedicated to other activities such as musical and cultural events and free speech gatherings. Critics also complained that the University's plan was little more than a veiled attack on the poor. Finally, some expressed the view that sand volleyball courts, appropriate to the environment in Newport Beach, seemed rather silly in Berkeley.

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The TRO enjoined the defendants from committing acts of vandalism, intimidating University employees, and interfering with the University's contractual relations.

The University asserted in its moving papers in support of the TRO that petitioner had scattered roses in the sand volleyball court, that she had moved a portable toilet without the Regents' permission and that she had been involved in an altercation with a volleyball court user (App. 35). In addition, the Regents accused her of heckling volleyball players.

The defendants countered that the suit was nothing more than a Strategic Lawsuit Against Public Participation (SLAPP) intended to deter the defendants and others from mounting a successful campaign against development of the Park.

On the day the suit was filed and thereafter, several University employees including its Vice Chancellor issued press releases and otherwise made public statements printed in several local newspapers and elsewhere in which they characterized petitioner and the other defendants as "perpetrators of violence" who "pose a serious threat to public safety that cannot be ignored." (App. 7-9).[4]

On February 10, 1995, the Alameda County Superior Court granted the Regents' motion for summary judgment and issued a permanent injunction. Petitioner intends to appeal.

[4] The full text of the statements attributed to respondents is set forth in the appendix at pp. 39-42).

Carol Denney and David Nadel[5] then filed this action for defamation against respondent Regents of the University of California and several of its Berkeley campus employees: Vice Chancellor, Daniel Boggan, Jr.; Public Information Officer Jesus Mena; Community Affairs Director Milton Fujii; and UC attorney, Christine Helwick, none of whom contested that they made the statements petitioner attributed to them.

Respondents moved for summary judgment claiming the protection of *New York Times v. Sullivan* 376 U.S. 254 (1964).[6] Petitioner argued in opposition to the motion that the rationale of *New York Times* does not extend to public entities and officials because the First Amendment is designed to curb rather than enhance government's already formidable power and was never intended as a safe harbor for public entities and officials who use their official positions to defame citizen-critics of government (App. 2).

The trial court rejected petitioner's claim and proceeded to find that she was a limited public figure in the controversy over People's Park (App. 1-3). The court then determined that petitioner failed to meet her burden of establishing that respondents published statements with knowledge that they were

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David Nadel is not a party to this petition.

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Respondents have not asserted at any time in this litigation that they are entitled to any privileges or immunities under state law.

false or with reckless disregard of the truth (App. 2).[7]

On appeal, petitioner renewed her argument that *New York Times* does not apply. The appellate court acknowledged that this case involved the two competing themes identified in *New York Times*: (1) the need to accommodate an unfettered exchange of ideas which the First Amendment is designed to promote; and (2) the interest of the state in affording a remedy for harm to reputation (App. 14).

However, the court of appeal also found that this case implicates another theme not present in *New York Times* which it described as "the overarching constitutional interest in protecting people from abuses of governmental power." (App. 18). This third theme creates the "constitutional conundrum" which the court of appeal acknowledges arises from an application of *New York Times* to this case (App. 27).

The court's analysis begins with an appreciation that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about

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The trial court actually granted "summary adjudication of issues" on petitioner's causes of action for defamation. Summary adjudication is the functional equivalent of the partial summary judgment in federal practice (*See* Cal. Code of Civ. Pro. § 437c). At the same time, the trial court granted judgment on the pleadings on additionally pled causes of action for violation of civil rights. The net result was that all of petitioner's claims were determined adversely to her in the trial court and an appeal was then taken from the ensuing final judgment. Petitioner did not contest on appeal the granting of the motion for judgment on the pleadings. Therefore, no issue pertaining to the ruling on the civil rights claims is before this court.

of political and social changes desired by the people" (citing *New York Times* at 376 U.S. 269) (App. 18). With the proper focus on the rights of listeners to receive information rather than on the identity of the speaker, the court concludes that it would seem irrelevant, for purposes of First Amendment applicability, whether the speaker is government or not (App. 19).

The court then observed that government has a legitimate role to play in the interchange of ideas and, in some instances, may be the only voice willing to present a particular side of a public issue (App. 18). The court commented that in the absence of governmental privileges and immunities, as in this case, the *New York Times* standard may be necessary to assure a constitutional "tit-for-tat" in accomodating the interests of the parties (App. 21).

In addressing the potential for governmental abuse of power, the court of appeal acknowledged the heightened vulnerability of a plaintiff engaged in a war of words with the government and concluded that this factor militates against application of the *New York Times* standard (App. 23).

The court also acknowledged petitioner's argument that the First Amendment "has been viewed historically as involving limitations on the government, not as a source of government rights" (App. 25). The court then questioned whether the government even needs First Amendment protection from the excesses of the community (App. 26).

Importantly, the court observed that extending

First Amendment protection to government may create a special danger that critics will refrain from exercising their First Amendment right to criticize government for fear of retaliatory defamation, thus inhibiting rather than promoting the exchange of ideas (App. 24).

The court of appeal attempts to balance these competing interests by first noting that, under California law, the liability of the University is derivative of the liability of the individual respondents and that First Amendment rights of these individuals are implicated rather than any institutional "right" of the University (App. 28-29). Such employees "should not be treated as having relinquished the protection of the First Amendment by virtue of government employment" (App. 28-29).

Since the court finds that the government has a legitimate role to play in the interchange of ideas, it should be entitled to some measure of protection in performing that role in the absence of any applicable state privileges and immunities (App. 28). Otherwise, "if government is compelled to guarantee the truth of its factual assertions on matters of public interest, its speech would be substantially inhibited, and the citizenry would be less informed". (App. 28).

Finally, the court concludes that "if the unfettered interchange of ideas is a central concern of the First Amendment, then application of the First Amendment to government speech in the context of limited protection from liability for defamation is entirely consistent with First Amendment dogma, in that it promotes government's contribution to the

marketplace of ideas." (App. 28).

In attempting to balance all three concerns: the unfettered interchange of ideas, the protection of reputation and the potential for abuse of government power, the court decided that the *New York Times* formulation achieves a satisfactory accommodation (App. 32).

REASONS FOR GRANTING THE PETITION

The published decision of the California Court of Appeal represents an unprecedented misapplication of the rule in *New York Times*. Ironically, this rule, fashioned initially to accord protection to government critics, will become a source of enhanced government power. The mere existence of such power, not to mention its foreseeable applications, will inhibit the expression of dissenting views when government -- immunized by First Amendment protection -- can resort to a defamatory counter attack against its critics, thereby quelling dissent by all except the most courageous.

This concern is more than conjectural. In this very case, in which the government sued petitioner for the torts of scattering roses and heckling volleyball players, it is legitimate to ask whether such a suit was intended to vindicate substantial rights, or calculated to inhibit free expression, peaceable assembly, and the right to petition.

When the Regents began its relentless, parallel media campaign to characterize petitioner as a threat to public safety that cannot be ignored, these same

questions are raised.

When the second highest official on the University of California at Berkeley campus refuses to dismiss the lawsuit because "we've got to wipe these guys out", "they're organizing against us" (App. 36, fn. 6), these questions are answered.

Almost anyone challenging government policy who draws attention to herself may qualify as a limited public figure subject to this perverse extension of the *New York Times* rule. This case presents an important and sensitive issue concerning the proper balance between the interests of government and its critics in debate on issues of public concern. These issues are of such import that they require a determination by this court.

Moreover, the decision of the court of appeal, although correctly identifying most of the interests at stake, fails to balance them consistently with its own reasoning. While the court acknowledges the issues of heightened vulnerability of plaintiffs in the face of government defamation and the danger of abuse of government power, it fails to account for either when it achieved virtually the same accommodation this court reached in *New York Times* where neither of these concerns was present.

Since respondents did not claim, nor did the court decide if respondents were protected by any state privileges or immunities, this case presents no dispositive questions of state law. Therefore, it is appropriate and necessary for this court to decide the federal question which is directly and unavoidably

presented.

I. The Question Presented Is Important

This case represents a radical new development, and a step over the edge from reason, in the evolution of the standard first announced in *New York Times v. Sullivan, supra*, 376 U.S. at 279-280 (1964) in which this court ruled that "a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is with knowledge that it was false or with reckless disregard for whether it was false or not."

The decision in *New York Times* achieved an accommodation between the interest of the state in protecting citizens from libel and the constitutional interest in maintaining the "vigor" and "variety" of public debate (*Id.* at 279). Accordingly, this court imposed severe restraints on public official plaintiffs in defamation cases to ensure the continued vitality of the First Amendment. Petitioner does not question the wisdom of this approach or ask this court to revisit that issue.

In *Curtis Publishing Co. v. Butts* 388 U.S. 130, 155 (1967), the *New York Times* rule was extended to cases in which the plaintiff is a public figure. Some people are deemed to be public figures for all purposes because they occupy positions of persuasive power and influence (*Gertz v. Robert Welch, Inc.* 418 U.S. 323, 345. Others become limited public figures

(for a limited range of issues) because they have thrust themselves to the forefront of particular controversies in order to influence the resolution of issues involved (*Id.* at 351).

Public figures are afforded less protection than private individuals because they can more easily counter criticism and expose the falsity of accusations made against them (*Gertz, supra* at 344). In addition, they have voluntarily assumed the risk of criticism by thrusting themselves into the forefront of controversy and therefore may be entitled to less protection than a private individual who may be caught up involuntarily in issues of public concern (*Id.* at 344-45).

All of the foregoing cases involved media defendants. Until this case, however, no court in the United States had decided that the principles which formed the basis for this court's opinions in *New York Times, Curtis,* and *Gertz* apply when the defendant is a government entity or government official.[8]

As the court of appeal acknowledged, official defamation is different from media or private defamation because the government "possesses a unique advantage over citizens in a war of words."

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This court has expressly refrained from deciding whether the *New York Times* rule applies to nonmedia defendants [*Hutchinson v. Proxmire* 443 U.S. 111, 133-134, fn. 16 (1979)] or specifically, its applicability to government entities or actors. Two lower court cases have applied the rule in cases of government defamation but the propriety of its application was not questioned in those cases. [*Anderson v. Low Rent Housing Comm.*, 304 N.W.2d 239, 247 (Iowa 1981); *McDowell v. Paiewonsky* 769 F.2d 942, 951 (3rd Cir. 1985)].

The court was "acutely mindful of the danger that government may abuse its power to speak" and that "the government is quite capable of misleading the public and defaming its citizens." (App. 31). These observations alone suggest that the *New York Times* rule may be too stringent to protect vulnerable citizens from the excesses of government speech.[9]

This is an important issue that cries for a more balanced resolution than the lower court's decision provides. In the absence of intervention by this court, that decision will remain precedent in the most populous state in the Union and may influence the development of law in other jurisdictions. A judgment that effectively deprives plaintiffs of any legal remedy to counter official defamation, except in the most egregious case, is not a sound accommodation of the interests involved. The citizenry will be reluctant to speak and its right to petition the government for a redress of grievances will be infringed.

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[9] Malice must be demonstrated by "clear and convincing" proof (*Gertz*, 418 U.S. at 342).

II. In Reaching Its Conclusion That *New York Times* Protection Was Available to Respondents, the Court of Appeal Did Not Properly Balance the Interests Involved

The court of appeal identified several issues of importance that bear on the degree of protection that plaintiffs should be afforded in defamation cases brought against the government and its agents.

The court reasoned that the "informing" function of government would be impaired unless the *New York Times* rule were upheld and further stated that the First Amendment rights of government employees would be infringed by application of any other standard. The court also expressed the view that an unfettered interchange of ideas would be thwarted. Since the lower court's resolution seems to be a product of these concerns, petitioner will address each of them below.

A. The Government's "Informing" Function

The court observed, and petitioner does not dispute, that the government has an important role to play "in informing, in educating and in persuading" (App. 19). "An approach that would invalidate all controversial government speech would seriously impair the democratic process" (Shiffrin, *Government Speech* (1980) 27 U.C.L.A. L.Rev. 565, 606). "If the government cannot address controversial topics, it cannot govern" (*Miller v. California Com. on Status*

of Women (1984) 151 Cal.App.3d 693, 701; 198 Cal.Rptr. 877). However, it does not follow from these undebatable propositions that the *New York Times* standard is necessary or appropriate to ensure that government will be capable of performing its functions. In reaching its conclusion, the court of appeal fails to acknowledge that these concerns are already addressed by state law.

The province of the various state legislatures is to enact statutes designed to avert serious impairment of the government's informing function by limiting, as appropriate, the availability of tort remedies directed to government speech. The official privilege which has been adopted in every state assures that damage suits would not otherwise "inhibit the fearless, vigorous, and effective administration of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (*Barr v. Matteo* 360 U.S. 564, 571 (1958) (referring to federal immunity).

California is among the states that affords protection for government speech (Cal. Civil Code § 47(a) (official duty privilege); Cal. Civ. Code § 47(b) (privilege in executive, legislative and judicial proceedings; Cal. Gov't. Code § 820.2 (discretionary immunity) . The problem, however, is that none of these privileges and immunities protects respondents from the falsehoods they published concerning the petitioner. This fact lends substance to the conclusion that nothing about this lawsuit offends any public policy which the various conditional and absolute privileges are designed to protect.

Despite the lack of defenses under state law, a California appellate court has reached out to confer on respondents the benefit of a federal rule that does not exist to assure efficiency of government operations, but rather to protect dissenters of government policies.[10] The lower court is simply incorrect when it concludes, contrary to legislative policy, that a judicially-fashioned extension of a federal rule is necessary to save the government from a speculative danger that it would be paralyzed in carrying out governmental functions.[11]

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In *New York Times* the court stated that the "privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen" for "it is as much [the] duty [of the critic] to criticize as it is the official's duty to administer" (*New York Times* at 282).

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The Court of Appeal suggested that the Director of Consumer Affairs, who is statutorily required to disseminate information concerning commercial and trade practices detrimental to consumers, might be sued, in the absence of First Amendment protection, for carrying out that function (Bus. & Prof. Code § 355(b) (App. 20-21). However, the Director would certainly enjoy the absolute official duty privilege conferred by Civil Code §47(a). Hence, he would not need First Amendment protection. In any case, the Legislature could grant him whatever immunity he would require to carrry out this informing function.

In contrast to this inapposite illustration and more pertinent to the case, the Legislature has never imposed any duty on the Regents to inform the public that persons protesting its land use policies are perpetrators of violence.

B. Unfettered Interchange of Ideas

This Court has expressed on several occasions that its central concern is not merely to provide immunity to the newsmedia but to protect the interests of the community in a free circulation of information i.e., to assure that listeners have access to "the widest possible dissemination of information from diverse and antagonistic sources" that the First Amendment is designed to protect [*See, e.g., Curtis Publishing Co. v. Butts, supra* 388 U.S. at 153; *Dun & Bradstreet, Inc. v. Greenmoss Buiders* 472 U.S. 749, 759 (1985)]. The court of appeal concludes that this right of listeners to receive information favors application of the *New York Times* standard to government defendants as well as media defendants.

However, the heightened vulnerability to government defamation of even a limited public figure plaintiff suggests that a correspondingly higher duty should be imposed on an official who occupies a position of public trust than the law now imposes on the editor of a supermarket tabloid under the standard of *New York Times*.

If, as the court of appeals opines, government today suffers at all levels from a serious credibility problem, then it seems not only fair, in the context of that heightened vulnerability, but even desirable to impose liability, at least for negligence when, as in this case, government falsely brands its critics as

criminals without affording them the benefit of a trial.[12] Such a rule would also have the salutary effect of promoting accuracy in government pronouncements and would contribute to the restoration of confidence in government.

As to the interests of the public in the fullest possible dissemination of information, the answer may lie in the proposition that the public deserves not to be misled by government officials who brand citizens carelessly, even when such officials lack provable awareness of the falsity of their statements.

Moreover, with the *New York Times* standard in place to immunize them, some irresponsible officials with an agenda of their own -- and not necessarily one that coincides with the public interest-- will have little incentive to pause for investigation before launching a defamatory attack against their critics. The stringent *New York Times* rule, which was never intended to promote good government, will only encourage public

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[12] In an analogous context, this court has ruled that reputational interests are entitled to constitutional protection and that such interests cannot be invaded by the state without notice and a hearing (*Wisconsin v. Constantineau* 400 U.S. 433 (1970) (invalidating ordinance that authorized posting of notices in retail liquor establishments identifying excessive drinkers); *Goss v. Lopez* 419 U.S. 565 (1974) (students have liberty interest in their good name which is infringed when a principal's suspends them without notice and opportunity to be heard); *Jenkins v. McKeithen* 395 U.S. 411 (1968) (interest in reputation sufficient to maintain suit against executive state commission which made findings of criminal wrongdoing without affording an opportunity to be heard); *Anti-Fascist Committee v. McGrath* 341 U.S. 123 (1951) (organizations designated by Attorney General as "communist" without affording notice and hearing).

officials to bask in self-serving ignorance, should that standard be appled to a case of officially-sanctioned defamation.

A prudent policy that takes into account the concept of a higher public duty will do more to assure that critics will continue their important work of criticizing, undeterred by the prospect of a government-sponsored character assassination campaign which *New York Times* does practically nothing to prevent.

C. Alleged Infringement of the First Amendment Rights of Government Speakers in the Absence of *New York Times* Protection

Part of the court of appeal's rationale for its extension of the *New York Times* rule to government employees stems from the proposition that such employees "should not be treated as having relinquished the protection of the First Amendment by virtue of government employment" (App. 28-29). In reaching its conclusion, the court failed to recognize that such employees do not speak only as individuals or on behalf of private institutions but with the imprimatur of state authority. It is this fact that calls into question the propriety of applying the strict *New York Times* rule to their conduct. The short answer to the court's ruling is that such employees have First Amendment rights as individuals, but not by virtue of government employment.

In California where the liability of a public entity is derivative of the liability of its employees[13], the court's ruling is tantamount to an extension of First Amendment protection to the government itself--not just the employees--since government is incapable of acting except through them.

However, the First Amendment is not designed to protect the government, but rather its dissenters. As Justice Potter Stewart has commented, "the First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." [*Columbia Broadcasting v. Democratic Comm.* 412 U.S. 94, 139 (1973) (concurring opn. Stewart J.)]. Moreover, this court has ruled that the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment applies to people, not states [*Pennsylvania v. New Jersey*, 426 U.S. 660 (1976)].

In a similar vein, Professor Yudof has noted "It would be standing the world on its head to think that the extension of First Amendment rights to private sector organizations requires a constitutionalization of government expression in order to counter the distortions brought about by such private institutions." (Yudof, *When Government Speaks* at 44-45).

It is possible to draw a distinction between the publication of an alleged defamatory statement as a official act, which the rule in *New York Times* does not protect, and publication of such a statement as a

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[13] Cal. Gov't. Code § 815.2.

private act. This distinction affords public employees the same protection when they speak individually that is afforded other persons. However, when such employees project the status and prestige of public office to add weight to the credibility of their assertions, then they should be entitled to no greater protection than is accorded them under existing state privileges and immunities.

This is a workable rule that could be applied under traditional principles of agency law. An employee who speaks on an issue of public concern need only say that he is speaking for himself and not as an agent of his employer, and thereby would gain all of the protection *New York Times* affords.[14]

Such a rule is consonant with the object of protecting both the First Amendment rights of public employees and the interests of plaintiffs who are vulnerable to officially-sanctioned defamation.

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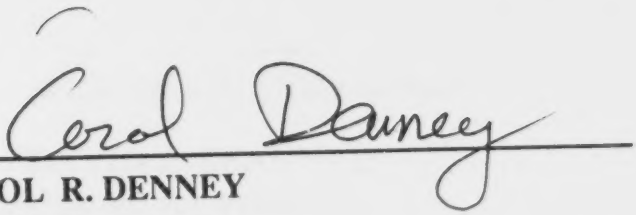
[14] The court of appeal acknowledged that the various policy considerations in this case arise from the individual defendants' conduct as University employees acting within the scope of government employment (App. 13). Vice Chancellor Boggan and Jesus Mena jointly participated in the preparation of an official University of California press release which contained alleged defamatory material (App. 7-9). Boggan also wrote letters on University of California letterhead signed "Vice Chancellor". Milton Fujii and Christine Helwick made statements to the press which were later printed in newspapers. The statements identify these individuals by title and contain no disclaimer that they expressed only private views.

CONCLUSION

Based on the foregoing, petitioner respectfully requests that the petition for a writ of certiorari be granted.

DATED: March 31, 1995.



CAROL R. DENNEY
Petitioner

1370 San Pablo Ave., #4
Berkeley, CA 94702
Tel.: (510) 548-1512

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA

DAVID NADEL and CAROL RUTH DENNEY
v.
REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al.

NO. 710760-1

ORDER GRANTING SUMMARY ADJUDICATION
AND
JUDGMENT ON THE PLEADINGS, ORDER
DENYING
MOTION FOR SANCTIONS.

Plaintiffs oppose the Defendants'Motion for Summary Adjudication of the third, fourth and fifth causes of action of the cross-complaint on three grounds. First, they contend they are not public figures outside the parameters of actionable defamation established by *New York Times v. Sullivan*, 376 U.S. 254 and elaborated by Reader's *Digest v. Superior Court* 37 Cal 3d 244. Second, they urge that issues of fact are presented as to the existence of malice on the part of the defendants. Third, they argue that since the First Amendment was framed as a limitation on the power of government it cannot be used as a shield by an agency of government. Plaintiffs' status as public figures is a question of law

for the court to decide *Reader's Digest* at pg. 252. Such public figures are described as having "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" *Gertz v Robert Welch Inc.* 418 U.S. 323. Defendants offer considerable evidence of the plaintiffs' voluntary activities at the forefront of the controversy over the development of "People's Park". Most of this evidence is in the form of statements by the plaintiffs themselves. Plaintiffs respond with 219 press articles in which they are not identified as leaders of the opposition to the Regents' proposals. This effort is unavailing since it is clear that press coverage alone can neither create nor negate the status of a public figure. Whatever the attitude of the press toward these plaintiffs. they have availed themselves of the public forum to further their aims and thus demonstrated the attitude of outspoken voluntarism which isthe hallmark of a limited public figure. They cannot now deny the public role they willingly assumed.

Plaintiffs have failed to carry their burden of producing "clear and convincing" evidence of "Constitutional malice" which is defined as "knowledge of falsity or reckless disregard for the truth". No admissable [sic] evidence of the subjective state of mind of the declarants has been proffered by the plaintiffs. Thus, there are no issues of fact presented.

Finally, the plaintiffs argue these "public officials officials" are not protected by the First Amendment under these circumstances. This contention presumes a dichotomy between the representative government

and individual citizens which cannot bear close scrutiny. The rule proposed by plaintiffs would render government "of the people and by the people" voiceless in the face of any dissent. Such efforts to stifle an opponent's opinions are precisely what the Amendment was designed to prevent.

ACCORDINGLY, IT IS ORDERED that all defendants' motions for summary adjudication of the third, fourth and fifth causes of action are GRANTED.

Defendants' motion for judgment on the pleadings as to the first and second causes of action is GRANTED as unopposed.

Defendants' motion for sanctions under CCP 128.5 is DENIED.

DATED: SEP 9 1993
JAMES R. LAMBDEN
Judge of the Superior Court

DAVID NADEL and CAROL RUTH DENNEY,
Plaintiffs and Appellants,
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Respondents.

No. A063549
Court of Appeal, First District,
Division 5.
Sept. 30, 1994.
Review Denied Dec. 22, 1994.

David J. Beauvais, Berkeley, for plaintiffs and appellants.

Paul D. Fogel, David R. Fredrickson, Thomas R. Burke, Valarie Mark, Crosby, Heafey, Roach & May, Oakland, for defendants and respondents.

KING, Associate Justice.

I. INTRODUCTION

In this case we hold that the standard of malice set forth in New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. *1255 2d 686, requiring a public official or public figure to prove knowledge of falsity or reckless disregard of the truth in order to establish a news media defendant's liability for defamation, also applies to defamation actions against government defendants.

David Nadel and Carol Ruth Denney appeal from a defense judgment in their defamation action against The Regents of the University of California and four

University employees, arising from the employees' statements concerning purportedly violent and destructive conduct by Nadel and Denney in opposing the construction of volleyball courts at People's Park in Berkeley. The court ruled that Nadel and Denney were public figures and failed to present evidence of malice. We affirm.

II. FACTS AND PROCEDURE

A. History of People's Park

People's Park, comprising 2.8 acres of open space, has been a subject of great controversy for more than 30 years. The University of California acquired the property in the early 1960s, intending to use it for student housing, but this plan went awry in the face of widespread opposition, which led to full-scale street battles between protestors and police in 1969. By the 1980s, the park had become a refuge for the homeless.

From 1987 through 1991, the University and the City of Berkeley devised a plan for joint management of the park: a portion of the property would be leased tothe city for development and maintenance as a city park, and the remainder would be developed and maintained by the University as an outdoor recreational facility. The first stage of the plan called for the University to construct two sand pit volleyball courts in a corner of the park. Construction began on July 31, 1991.

B. Opposition to the Volleyball Courts

A group of protestors, the People's Park Defense Union (hereafter Union), opposed the construction of the volleyball courts, and in a series of fliers warned of violent consequences. One flier declared, "IF IT IS CLASS WAR THEY WANT IT IS CLASS WAR THEY WILL GET," as well as "THEY TRY IT--WE RIOT!" and "We must impress upon these ruling class, selfish, and mean spirited pricks that their BMWs and Mercedes [sic] will not be safe on the streets of Berkeley nor will construction sites for condos and UC or yuppie developments. They may be capable of suppressing mass actions, but will not be able to cope with a guerrilla campaign of attrition and retribution." Another flier announced "a summer-long campaign of direct action *1256 aimed at making life impossible for those who would build on Peoples [sic] Park." Yet another warned potential contractors that their tools and equipment would be "subject to regular monkey wrenching" and their day's work would be "done in during the night."

As construction of the courts progressed to completion and public use commenced, opposition by the Union escalated, sometimes with violent results. There were incidents of vandalism and damage to the courts, confrontations between protestors and court users, and--as promised--rioting.

Nadel and Denney were members of the Union and were active and vocal opponents of the volleyball courts. Nadel spoke out against park development at city council meetings and at public demonstrations, helped organize public events in the park, wrote a

letter to the editor of a local newspaper and an "open letter" to the University and the city addressing the development issue, and spoke to print media reporters who included his comments in articles about the People's Park controversy. Denney also spoke out against park development at city council meetings and made anti-development speeches at political andcultural events. Additionally, she participated in a press conference regarding an incident at a demonstration in which she was arrested.

C. The Purported Defamation

On January 10, 1992, the University sued the Union, Nadel, Denney and two other activists for damages and injunctive relief, and obtained a temporary restraining order (TRO) enjoining the defendants from committing acts of violence and vandalism against University employees and property. During the next several months, four University employees--the individual defendants in the present defamation action--issued press releases and made statements to the press and the public regarding the University's lawsuit and the TRO, in which Nadel and Denney were characterized as perpetrators of violence and destruction of property.

On the day the University filed its lawsuit, Jesus Mena, a public information officer, issued a press release explaining that the lawsuit was "aimed at deterring the campaign of destruction and violence against University of California at Berkeley facilities, students, and employees--as well as park and community users--by the People's Park Defense Union and several of its principal members." The press

release referred to "numerous specific **191 acts of violence committed by these parties" as well as "repeated threats of violence."

Mena's press release was accompanied by a written statement by Vice-Chancellor Daniel Boggan, Jr., which included the following assertions: *1257 "During the past several months, a small group of individuals has maliciously endangered public safety through continuing acts of violence intended to destroy University property and injure or intimidate people who use University facilities. [P] ... This small band of individuals, dissatisfied with the current plans for People's Park, are [sic] using fear and violence in an attempt to impose their [sic] will on the community.... [P] The University believes that the imposition of legal sanctions against these parties will help to diminish the threat posed by tactics of intimidation, and will protect not only the safety of the public, but perhaps more importantly, the rights of all the people." (Original emphasis.)

An article in the Daily Californian dated January 27, 1992, quoted Milton Fujii, the University's community affairs director, as stating, "These are folks who have shown a repeated pattern of violent or destructive actions, (and who are) most responsible for the damage and violent acts."

An article in the East Bay Express dated March 13, 1992, quoted University attorney Christine Helwick as stating, "We are not after anyone except those who have a history of violent conduct." A subsequent article in the San Francisco Weekly quoted Helwick as stating, "There has been a

deliberate, violent campaign to hinder the university's ability to transition this property into a park."

On March 25, 1992, Vice-Chancellor Boggan issued a press release on the costs incurred by the University in the development of People's Park, in which he stated that "a few individuals have committed themselves to obstructing, through sometimes violent and destructive tactics, every attempt by the University and the City to restore a healthy environment at the park.... [P] Although small in number, those who have continually shown wanton disregard for other people's rights and well-being pose a serious threat to public safety that cannot be ignored." The press release concluded with an affirmation of the University's commitment to pursue "litigation to deter perpetrators of violent and destructive acts." On April 8, 1992, this press release was quoted in the Berkeleyan.

Finally, in a letter dated July 9, 1992, replying to a citizen's letter concerning the University's lawsuit, Vice-Chancellor Boggan said, "These individuals stated that their goal was to sabotage University facilities at People's Park and to undermine the agreement between the University and the City.... Unable to alter the consensus through debate and reasoned discourse, they resorted to the use of fear and violence to impose their will on the community." *1258

D. The Present Litigation

In 1993, Nadel and Denney sued the University, Mena, Boggan and Helwick for civil rights violations

and defamation. Fujii, against whom Nadel and Denney had filed a cross-complaint for defamation in the University's lawsuit, was later severed from that case and joined in the present action. The University and the individual defendants moved for summary adjudication as to defamation, asserting Nadel and Denney were public figures and could not demonstrate "constitutional malice"--I.E., knowledge of falsity or reckless disregard of the truth--as required by New York Times Co. v. Sullivan, supra, 376 U.S. at pages 279-280, 84 S.Ct. at page 726. [1] The defendants also moved, unopposed, for judgment on the pleadings on the civil rights claims.

The court granted summary adjudication and judgment on the pleadings, and rendered a defense judgment. In a written order, the court explained that Nadel and Denney were limited purpose public figures by virtue of having "thrust themselves to the forefront" of the People's Park controversy (Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789) and had **192 failed to produce evidence of constitutional malice.

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The parties employ, and we adopt, the term "constitutional" malice in order to distinguish the New York Times definition of malice from common law malice (see, e.g., Civ.Code, s 3294, subd. (c)(1)).

III. DISCUSSION

A. Applicability of New York Times Standard

The primary claim asserted by Nadel and Denney is that a government defendant in a defamation action is not protected by the First Amendment, and hence the New York Times standard of constitutional malice is inapplicable. Their brief argues that the First Amendment "exists not to protect government but especially to protect its dissenters" and "is designed to curb, not enhance, government's already formidable power." This is an issue of first impression.

Nadel and Denney also contend they were not limited purpose public figures and produced evidence of constitutional malice. Before reaching those issues, we must first decide whether they are germane at all--i.e., whether the New York Times standard, which poses them, applies in the present case.

*1259 We use the terms "government" and "government defendant" throughout this opinion to refer to both a public entity [2] and its employees

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The University of California is a "public trust ... with full powers of organization and government...." (Cal. Const., art. XI, s 9, subd.(a).) Its regents "have been characterized as 'a branch of the state itself' (Pennington v. Bonelli (1936) 15 Cal.App.2d 316, 321 [59 P.2d 448]) or 'a statewide administrative agency' (Ishimatsu v. Regents of University of California

III. DISCUSSION

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within the scope of their employment. Under California law, a public entity may be held vicariously liable for the conduct of its employees acting within the scope of their employment, but only to the extent that the employees may be held liable. (Gov.Code § 815.2, subd. (a); Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal.App.3d 814, 819; 131 Cal.Rptr. 854.) The University's liability is dependent upon the liability of the individual defendants--so that if New York Times protection applies to the individual defendants, it necessarily extends to the University. Thus, in the context of this case, when we refer to conduct by "government" and "government defendants," we are actually referring to the conduct of the individual University employees, from which any liability of the University is derivative. The various policy considerations implicated in this case arise from the individual defendants' conduct as University employees acting within the scope of their government employment, not from the University's institutional conduct.

316, 321 [59 P.2d 448] or 'a statewide administrative agency' (Ishimatsu v. Regents of the University of California (1968) 266 Cal.App.2d 854, 864 [72 Cal.Rptr. 756]}." (Regents of the University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130, 135, 143 Cal.Rptr. 276.)

1. Decisional background

Our analysis begins with an overview of the New York Times standard, its subsequent development, and the extent to which it remains undeveloped.

The United States Supreme Court held in New York Times Co. v. Sullivan, supra, 376 U.S. at pages 279-280, 84 S.Ct. at page 726, that the constitutional guarantee of freedom of speech requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Court's primary rationale was that a contrary rule compelling a critic of official conduct to guarantee the truth of factual assertions would inhibit the "vigor" and "variety" of public debate. (Id. at p. 279, 84 S.Ct. at p. 725.) Subsequent decisions explained that the creation of the New York Times standard of malice represents an "accommodation" between the constitutional interest in promoting unfettered debate on public issues and the limited state interest in protecting citizens from libel. (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 343, 94 S.Ct. at p. 3008; Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 153, 87 S.Ct. 1975, 1990-91, 18 L.Ed.2d 1094.)

*1260 The plaintiff in New York Times was a public official. In Curtis Publishing Co. v. Butts,

supra, 388 U.S. at page 155, 87 S.Ct. at page 1991, the Supreme Court extended the New York Times rule to cases where the plaintiff is a public figure. In Gertz v. Robert **193 Welch, Inc., supra, 418 U.S. at page 345, 94 S.Ct. at page 3009, the Supreme Court described two types of public figures: "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." The latter become public figures "for a limited range of issues." (Id. at p. 351, 94 S.Ct. at p. 3013.)

Each of these cases involved *news media defendants*. The Supreme Court has never said whether the New York Times rule applies in litigation by a public official or public figure against an individual defendant who is not a member of the news media. In fact, the Court has expressly refrained from deciding that issue. (Hutchinson v. Proxmire (1979) 443 U.S. 111, 133-134, fn. 16, 99 S.Ct. 2675, 2687, fn. 16, 61 L.Ed.2d 411.)

Numerous state courts have held, as a general proposition, that the New York Times rule does indeed apply to nonmedia defendants, usually on the theory that there is no basis for affording greater protection to the media than to ordinary citizens. (E.g., Anderson v. Low Rent Housing Com'n, etc. (Iowa 1981) 304 N.W.2d 239, 247; VandenToorn v.

Bonner (Mich.App.1983) 342 N.W.2d 297, 301-302 [129 Mich.App. 198]; Britton v. Koep (Minn.1991) 470 N.W.2d 518, 521; Casso v. Brand (Tex.1989) 776 S.W.2d 551, 554; see Annot., Defamation: Application of New York Times and related standards to nonmedia defendants (1985) 38 A.L.R.4th 1115.) This includes California. In Miller v. Nestande (1987) 192 Cal.App.3d 191, 200, 237 Cal.Rptr. 359, the court concluded: "Whether criticism of public officials is published by the media or disseminated by individuals, we hold it is protected by the constitutional standard expressed in New York Times." (Fn. omitted.) This approach finds support from Justice William J. Brennan, Jr., who observed in 1985 that "at least six Members of this Court ... agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." (Dun & Bradstreet, Inc. v. Greenmoss Builders (1985) 472 U.S. 749, 783-784, 105 S.Ct. 2939, 2958, 86 L.Ed.2d 593 (dis. opn. of Brennan, J.).)

No court, however, has decided the specific question whether the New York Times standard applies to a defendant that is not only not a member of *1261 the news media, but is a governmental entity or public official.[3] This may be because in many (if not

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The defendants in Anderson v. Low Rent Housing Com'n, Etc., supra, 304 N.W.2d 239, were a public

most) cases of purported defamation by the government, some statutory or common law privilege or immunity will apply. (See, e.g., Civ.Code, s 47, subds. (a) [privilege in discharge of official duty] & (b) [privilege in legislative, judicial, or other official proceeding]; Gov.Code, s 820.2 [immunity for discretionary act of public employee].)

The present case requires a resolution of that specific New York Times question. The defendants claim no statutory privilege or immunity, and case law suggests none is applicable here. (See Sanborn v. Chronicle Pub. Co. (1976) 18 Cal.3d 406, 412-415, 134 Cal.Rptr. 402, 556 P.2d 764 [no official duty privilege or discretionary act immunity where county clerk made defamatory statements to newspaper reporter]; Toney v. State of California (1976) 54 Cal.App.3d 779, 792-793, 126 Cal.Rptr. 869 [college's decision to issue press release an immune discretionary act, but timing, content and manner of release a nonimmune "operational" implementation of policy]; see also Susan A. v. County of Sonoma

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agency and public employee; the court held the New York Times standard "applies to both media and nonmedia defendants" (id. at p. 247), but did not address or decide the more specific question whether New York Times applies to a nonmedia government defendant. (See also McDowell v. Paiewonsky (3d Cir.1985) 769 F.2d 942, 951 [applying New York Times in defamation action against legislator without acknowledging or deciding applicability issue].)

(1991) 2 Cal.App.4th 88, 93-97, 3 Cal.Rptr.2d 27.)

2. Competing interests

In deciding this issue, we are compelled to pursue an "accommodation" similar to that achieved by New York Times and its progeny. **194 In doing so, we confront the two competing themes underlying New York Times-- the First Amendment right of the people to the unfettered interchange of ideas, versus the state interest in protecting citizens from libel--plus a third theme, the overarching constitutional interest in protecting people from abuses of governmental power.

a. Unfettered interchange of ideas

On the one hand, the United States Supreme Court has repeatedly stressed that the First Amendment " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " (New York Times Co. v. Sullivan, supra, 376 U.S. at p. 269, 84 S.Ct. at p. 720, quoting Roth v. United States (1957) 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498; accord, e.g. Dun & Bradstreet, *1262 Inc. v. Greenmoss Builders, supra, 472 U.S. at p. 759, 105 S.Ct. at p. 2945; Connick v. Myers (1983) 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708.) The central concern is not simply the right of the news media to immunity, but "the interests of the community in free circulation of information" (Curtis

Publishing Co. v. Butts, supra, 388 U.S. at p. 153, 87 S.Ct. at p. 1990, emphasis added)--that is, "the rights of listeners to 'the widest possible dissemination of information from diverse and antagonistic sources.' " (Dun & Bradstreet, Inc. v. Greenmoss Builders, supra, 472 U.S. at p. 783, 105 S.Ct. at p. 2958, emphasis added (dis. opn. of Brennan, J.), quoting Associated Press v. United States (1945) 326 U.S. 1, 20, 65 S.Ct. 1416, 1424-25, 89 L.Ed. 2013.) "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source...." (First National Bank of Boston v. Bellotti (1978) 435 U.S. 765, 777, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707.)

With the proper focus on the rights of listeners to receive information rather than on the identity of the speaker, it would seem irrelevant, for purposes of First Amendment applicability, whether the speaker is media or not, and government or not. This point favors application of First Amendment protections, and hence the New York Times standard, to government defendants, just as it has been relied upon to favor application of the standard to nongovernment nonmedia defendants. (E.g., Miller v. Nestande, supra, 192 Cal.App.3d at p. 198, 237 Cal.Rptr. 359.)

Moreover, a persuasive case can be made that government has a legitimate role to play in the interchange of ideas. "Government has legitimate interests in informing, in educating, and in persuading. If government is to secure cooperation

in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs, government must be able to communicate. An approach that would invalidate all controversial government speech would seriously impair the democratic process." (Shiffrin, Government Speech (1980) 27 U.C.L.A. L.Rev. 565, 606 (hereafter Shiffrin); see also Tribe, American Constitutional Law (2d ed. 1988) p. 807 [government can "add its own voice to the many that it must tolerate, provided it does not drown out private communications"]; Miller v. California Com. on Status of Women (1984) 151 Cal.App.3d 693, 701, 198 Cal.Rptr. 877 ["If the government cannot address controversial topics it cannot govern."].)

Even the preeminent critic of unrestricted government speech, University of Texas Professor Mark G. Yudof (see post, at pp. 195-196), concedes that "government is sometimes uniquely situated to gather and disseminate particular types of information. And in some cases governments may be *1263 virtually the only entities with resources willing to present a particular side of a public issue." (Yudof, When Government Speaks (1983) p. 46 (hereafter Yudof).)

For example, in California, the Director of the Department of Consumer Affairs is statutorily required to disseminate to the public information concerning "[c]ommercial and trade practices which are detrimental to consumers" (Bus. & Prof.Code, s

335, subd. (b)) and "[g]oods and services which are unsafe, unhealthful or inimical to the general welfare of consumers" (Bus. & Prof.Code, s 335, subd. (c)). In certain situations, the Department of Consumer Affairs might be uniquely situated to acquire such information, yet in **195 carrying out the informing function--e.g., apprising the news media of detrimental trade practices by specific individuals--might invite a defamation lawsuit absent First Amendment protection. Withholding the New York Times standard--i.e., compelling the agency to guarantee the truth of factual assertions--could inhibit the agency's performance of its informing function, to the ultimate detriment of consumers.

A secondary rationale of the New York Times decision was that because statements by public officials are generally protected by conditional immunity, i.e., absent malice, "[i]t would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." (New York Times Co. v. Sullivan, supra, 376 U.S. at pp. 282-283, 84 S.Ct. at p. 727.) The Court characterized its newly-created standard as "appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen." (Id. at p. 282, 84 S.Ct. at p. 727, original emphasis.) This constitutional tit-for-tat is absent where, as is evidently the case here, the government defendant is not protected by statutory privileges and immunities. Thus, it makes sense to extend the New York Times standard to government defendants in

such situations, in order to maintain the balance sought by the Supreme Court in creating that standard.

b. Protection of vulnerable citizens from defamation

On the other hand, in deciding when to apply the New York Times standard, the United States Supreme Court has focused on the relative vulnerability of the plaintiff to injury from defamation. The Court has explained that public officials and public figures are not especially vulnerable to defamation by the news media, and thus are less in need of protection (i.e., the New York Times standard applies), because they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than *1264 private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 344, 94 S.Ct. at p. 3009, fn. omitted.) Relying in part on the increased vulnerability of private persons to injury from media defamation, the Court concluded, "Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times." (Id. at p. 348, 94 S.Ct. at p. 3011.)

If a plaintiff's relative vulnerability is a proper focus of First Amendment analysis, it works against application of the New York Times standard to government defendants. This is because government--federal, state, and perhaps to a lesser extent local--possesses a unique advantage over the individual citizen in a war of words. "One need only notice the ready access of government officials to the mass media, the franking privilege, the constant stream of legislative and executive reports and publications, and the massive system of direct grants and indirect subsidies to the communications process (including federal financing of elections) to recognize that speech financed or controlled by government plays an enormous role in the marketplace of ideas." (Shiffrin, supra, at p. 569, fns. omitted.) Professor Yudof warns, "Expression by government is critical to democratic processes, but the power of governments to communicate is also the power to destroy the underpinnings of government by consent. The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime." (Yudof, supra, at p. 42.) To the latter list can be added the power *to defame*.

The extent of this concern is debatable in light of general post-Watergate skepticism about anything the government has to say. One commentator argues, "Because an enormous quantity of antigovernment communications is available, and because almost no segment of the media seems unwilling to criticize the government when the occasion arises, it is unlikely

that government speech has any special persuasive powers by virtue **196 of its governmental origins. On the contrary, antigovernment biases may be so great, particularly with reference to the veracity of political leaders, that much government speech may encounter a public strongly predisposed to disbelief." (Schauer, Is Government Speech a Problem? (1983) 35 Stan.L.Rev. 373, 381.) And a similar claim of plaintiff vulnerability could be made as to any "big media" defendant. (See Tribe, American Constitutional Law (2d ed. 1988) p. 809, fn. 16.)

But while public suspicion of government has certainly increased in the past few decades, we believe that government speech, imbued as it is with *1265 the imprimatur of state authority, still retains a special force that media speech lacks. This is no less true--the impact upon the plaintiff is the same--where, as here, the government speaks not institutionally but through the voice of its employees acting within the scope of their employment, a prerequisite for public entity liability under Government Code section 815.2 (see ante, p. 192). This concern must be accommodated in addressing the issue of government liability for defamation.

Moreover, if citizens are indeed more vulnerable to government defamation because of the unique power and authority of the state, there may be a special danger that they will refrain from exercising their First Amendment right to criticize government, for fear of retaliatory defamation--with the result that the interchange of ideas is inhibited. This danger,

however, is far greater where government is conferred with absolute privilege (see Barr v. Matteo (1959) 360 U.S. 564, 584-585, 79 S.Ct. 1335, 1346-47, 3 L.Ed.2d 1434 (dis. opn. of Warren, C.J.)) than where, as here, we consider conferring what is in effect a conditional privilege dependent on the absence of constitutional malice. Government will be less likely to retaliate if malicious defamation is actionable than if no defamation is actionable.

c. Impropriety of government invoking First Amendment

There is a third concern here, not implicated in New York Times and its progeny--the notion asserted by Nadel and Denney that the First Amendment does not protect government from its citizens, but only citizens from government.

Simple as this notion appears, it has considerable merit, as well as persuasive defenders. Professor Yudof, a forceful advocate for limiting the extension of First Amendment protections to government speech, has argued, "The First Amendment has been viewed historically as involving limitations on government, not as a source of government rights. Constitutional rights like those embodied in the Bill of Rights have not been extended to government bodies, but only to individuals and groups within the private sector.... It would be standing the world on its head to think that the extension of First Amendment rights to private sector organizations requires a constitutionalization of government

expression in order to counter the distortions brought about by such private institutions." (Yudof, supra, at pp. 44-45, fns. omitted.) Similarly, Justice Potter Stewart has commented, "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." (Columbia Broadcasting v. Democratic Comm. (1973) 412 U.S. 94, 139, 93 S.Ct. 2080, 2104-05, 36 L.Ed.2d 772, original emphasis (conc. opn. of Stewart, J.).)

*1266 Moreover, as a practical matter, government may not have an overwhelming need for First Amendment protection. "Governments, particularly the federal government, are not fledgling communicators, needing protection from the community's excesses; they may pose more of a threat than do corporations. The emasculation by state or federal courts of the government's power to communicate, or self-emasculation of these powers by other branches of government, is unlikely. Policy reasons may warrant protection of government speech for the good of all. But it is inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community." (Yudof, supra, at p. 45, fn. omitted.)

The overarching constitutional focus on protecting citizens from abuses of government power, rather than protecting government **197 from its citizens, is a substantial counterbalance against the argument that the First Amendment purpose of assuring unfettered interchange of ideas favors application of

First Amendment protections, and hence the New York Times standard, to government speech. In Professor Yudof's words, "The 'right to know' formulation simply obfuscates the problem of how and why governments should have rights against the community under a First Amendment designed to limit government powers." (Yudof, supra, at p. 47.)

3. Striking a balance

Is there a way out of this constitutional conundrum? Can we strike a balance that accommodates all three of these competing concerns? We believe so.

We begin with the proposition that any potential liability of government for publishing a defamatory statement is itself a check on government abuse of its power to defame. Professor Yudof has himself characterized "laws ... holding government or its officers liable for defamation" as one source of protection "from overzealousness in government speech." (Yudof, supra, at p. 188.) Thus, even if the New York Times standard is applied to government speech, governments still face the threat of liability (assuming no privilege or immunity) for defamatory speech that is constitutionally malicious. This threat, though limited in practical application, provides at least a baseline level of protection to a vulnerable citizenry from abuse of government power.

Next, if government has a legitimate role to play in the interchange of ideas--as we conclude it does--then

government should have some measure of protection in performing that role, at least as to matters of public interest. Otherwise, if government is compelled to guarantee the truth of its factual *1267 assertions on matters of public interest, its speech would be substantially inhibited, and the citizenry would be less informed. Thus, it is appropriate to extend the limited First Amendment protection of the New York Times standard to government speech, so that government may be held liable for defamation of a public official or public figure (i.e., in matters of public interest) only where there is knowledge of falsity or reckless disregard of the truth. This also maintains the balance of conditional privilege between criticism of government and criticism by government in the absence of statutory privileges and immunities.

Finally, regarding the point that extension of First Amendment protection to government is inconsistent with the notion that the constitution protects citizens from government rather than government from citizens, our best answer is that if the unfettered interchange of ideas is a central concern of the First Amendment, then application of the First Amendment to government speech in the context of limited protection from liability for defamation is entirely consistent with First Amendment dogma, in that it promotes government's contribution to the marketplace of ideas. Moreover, in California, where a public entity's tort liability is derivative of employee liability (Gov.Code, s 815.2; see ante, p. 192), our primary concern is with the extension of First Amendment protection not to the entity but to

the employee, who should not be treated as having relinquished the protection of the First Amendment by virtue of government employment.

We conclude that application of the New York Times standard of Constitutional malice to government defendants in defamation cases represents an appropriate accommodation of the three competing interests implicated in this context of government speech. [4]

We are not entirely on our own in reaching this conclusion. Professor Yudof views Hutchinson v. Proxmire (1979) 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 as pointing in **198 the same direction. (Yudof, supra, at p. 286.)

In Hutchinson, research scientist Ronald Hutchinson sued Senator William Proxmire and his

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Nadel and Denney suggest there are procedural due process implications to such application ofNew York Times, citing cases holding that government may not take administrative action which harms a person's reputation without affording notice and an opportunity to be heard. (E.g., Wisconsin v. Constantineau (1971) 400 U.S. 433, 436-437, 91 S.Ct. 507, 509-10, 27 L.Ed.2d 515.) Those cases are inapposite, however, as the challenged statements in the present case neither constituted nor were part of any administrative action.

legislative assistant for defamation after receiving Senator Proxmire's "Golden Fleece" award for wasteful government spending. The Court held that in describing the award to Hutchinson in newsletters and a press release, the defendants were not immune under the Speech or Debate *1268 Clause of the United States Constitution, which states that "for any speech or debate in either house," members of Congress "shall not be questioned in any other place" (U.S. Const., art. I, s 6), because the newsletters and press release were not essential to the deliberations of the Senate or part of the Senate's deliberative process. (Hutchinson v. Proxmire, supra, 443 U.S. at p. 130, 99 S.Ct. at p. 2686.)

The Court also held Hutchinson was not a public figure under the New York Times standard of Constitutional malice. (Id. at pp. 133-136, 99 S.Ct. at pp. 2687-89.) The Court said its conclusion that Hutchinson was not a public figure "makes it unnecessary" to decide "whether the New York Times standard can apply to an individual defendant rather than a media defendant." (Id. at pp. 133-134, fn. 16, 99 S.Ct. at p. 2687, fn. 16.) Nevertheless, the Court's careful consideration whether Hutchinson was in fact a public figure suggests that issue was pivotal, and a different result might well have obtained (i.e., no liability for defamation absent malice) had Hutchinson been a public figure.

Professor Yudof believes the decision in Hutchinson "goes a long way toward extending New York Times v. Sullivan to libel and slander by public

officials. Thus, certain types of objectionable speech by public officials may lead to damage recoveries by those injured, thereby serving the important function of limiting what government officers may say--particularly as they rely on the prestige of their official positions. On the other hand, 'vigorous debate on public issues' is not diminished by the drastic alternative of enjoining government and its officers from speaking out. The accommodation of the needs to promote and to circumscribe government expression reached in Hutchinson is both wise and workable." (Yudof, supra, at p. 286, fn. omitted.)

In light of the Supreme Court's express disclaimer of a decision whether New York Times applies to nonmedia defendants, we hesitate to ascribe as much significance to Hutchinson as does Professor Yudof. Nevertheless, we agree that application of the New York Times standard to government speech accommodates the competing needs both to promote and to circumscribe government expression, and is "wise and workable." (Yudof, supra, at p. 286.)

4. Conclusion

We are acutely mindful of the danger that government may abuse its power to speak. Events of the past few decades have demonstrated that government is quite capable of misleading the public and defaming its citizens. But we also perceive that government has a legitimate role to play in the interchange of ideas. In determining the extent to which government *1269 speech implicates the First

Amendment in the context of government liability for defamation, we are compelled to accommodate three competing interests--the First Amendment interest in promoting the unfettered interchange of ideas, the state interest in protecting citizens from the power of government to defame them, and the overarching constitutional interest in protecting citizens from government rather than government from its citizens--and to draw a line between government's legitimate expression of ideas and its abuse of the power to speak. We believe the New York Times standard of constitutional malice provides a fair and feasible measure for determining whether government has stepped over that line.

It remains only for us to decide whether the trial court correctly determined that Nadel and Denney were limited purpose public figures and failed to produce evidence of constitutional malice.

B. Public Figure Status

The court correctly ruled that Nadel and Denney were public figures by virtue of **199 having "thrust themselves to the forefront" of the People's Park controversy. (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 345, 94 S.Ct. at p. 3009.)

Nadel spoke publicly at city council meetings and demonstrations. He wrote a letter to the editor of a local newspaper and an "open letter" to the University and the city, and spoke to print media reporters who included his comments in articles about

People's Park. He also regularly staffed an "information table" on Sunday afternoons in the park. There can be no reasonable doubt that he thrust himself to the forefront of the controversy "in order to influence the resolution of the issues involved." (Ibid.; see Rudnick v. McMillan (1994) 25 Cal.App.4th 1183, 1190, 31 Cal.Rptr.2d 193 [public figure status where plaintiff approached publisher of one article and expressed concern over issue, and encouraged interest of writer of another article].) [5]

This conclusion is bolstered by Nadel's own comments in a letter he wrote to one of the regents after the University filed its lawsuit, in which he asserted, "We've gotten great local press, and I've been on 6 radio stations with 11 more scheduled. After radio then T.V. I will make my case throughout California." Public figures "usually enjoy significantly greater access to *1270 the channels of effective communication and hence have a more realistic opportunity to counteract false statements than

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Nadel points to numerous newspaper and magazine articles about the People's Park controversy in which he was not mentioned. The proper focus, however, is not on the degree of media attention he received, but his attempt "to influence the resolution of the public issues involved." (Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 254, 208 Cal.Rptr. 137, 690 P.2d 610, fn. omitted.)

private individuals normally enjoy." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 344, 94 S.Ct. at p. 3009.) By Nadel's own account, that characterization would certainly apply to him.

Denney seems to have been somewhat less prominent in the People's Park controversy, but she nevertheless thrust herself to its forefront. Like Nadel, she spoke publicly at city council meetings and at political and cultural events. She also invited publicity by participating in a press conference regarding an incident at a demonstration in which she was arrested. The court properly determined that both plaintiffs were limited purpose public figures.

C. Absence of Constitutional Malice

Likewise, the court correctly ruled that Nadel and Denney failed to produce evidence of constitutional malice.

There was no evidence the defendants knew their statements were false. The four individual defendants each asserted in declarations, without contradiction, that they believed at all times that the statements were true. Nor was there evidence of reckless disregard of the truth--i.e., that the defendants "in fact entertained serious doubts as to the truth" of their statements. (St. Amant v. Thompson (1968) 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262.) To the contrary, the evidence demonstrated reliance on information from reputable sources, and no reason to doubt the accuracy of that information, which relieves

a publisher of any obligation to investigate personally. (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 259, 208 Cal.Rptr. 137, 690 P.2d 610; Church of Scientology Intern. v. Daniels (4th Cir.1993) 992 F.2d 1329, 1334.)

The University, in support of its application for a TRO, presented declarations by University employees describing several acts of vandalism and battery by Nadel and Denney, including the following: On August 9, 1991, Denney threw thorn-stemmed roses into the volleyball court sand pit, and tried to kick a volleyball player but missed and kicked a University employee instead. On the weekend of August 10-11, 1991, Nadel and some others ripped down the volleyball nets, causing the nets to graze the face of a University employee. On September 28, 1991, Nadel, Denney and other protestors moved a portable toilet from park premises into a street. And on January 4, 1992, Nadel pushed a University employee who was removing a leaflet Nadel had posted on a lamp post.

*1271 More generally, the employees described Nadel and Denney as frequent participants **200 in the People's Park protests, which indisputably became violent and destructive.

In contrast, Nadel and Denney presented no evidence tending to show reckless disregard of the truth. Nadel merely asserted in a declaration, "At no time have I ever committed an act of unprovoked violence against any person in People's Park nor have I ever been accused in a court of law, or convicted of

any such act." (Emphasis added.) He did not disclaim acts of violence he would view as "provoked." Denney merely asserted generally in her declaration that she had never committed acts of "destruction of property or injury to persons" in People's Park. She did not disclaim the specific acts attributed to her by the University employees (though she characterized her attempt to kick one of the volleyball players as self-defense). Neither plaintiff showed any reason for the University to doubt the accuracy of its employees' reports.[6]

In short, the University employees' reports of specific acts of vandalism and battery by Nadel and Denney, along with the plaintiffs' general immersion in a cause which degenerated into destruction and rioting, were grounds for reliance by the defendants in characterizing the plaintiffs as perpetrators of violence and destruction of property. Those characterizations might have been untrue, or at least exaggerated, but their support in the record precludes any

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[6] Nadel and Denney contend there was evidence of "ill-will," consisting of Vice-Chancellor Boggan's purported statement to an attorney that "[w]e got to wipe those guys out" with the University's lawsuit "because they are organizing against us" at a nightclub owned by Nadel. This was not, however, evidence of constitutional malice, but only common law malice. (See ante, fn. 1.)

determination that they were asserted with reckless disregard as to their truth. The court properly concluded there was no evidence of constitutional malice.

IV. DISPOSITION

The judgment is affirmed.

PETERSON, P.J., and HANING, J., concur.

FILED DEC 22 1994

ROBERT WANDRUFF, CLERK
H. CRUZ, DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DAVID NADEL Et Al., Appellants

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET Al., Respondents

Petition for review DENIED.

LUCAS
CHIEF JUSTICE

Following are texts of the statements made by the respondents:

STATEMENT OF MILTON FUJII

"These are the folks who have shown a repeated pattern of violent or destructive actions. . . (Daily Californian. January 27, 1992.

STATEMENTS OF DANIEL BOGGAN, JR.

On January 10, 1992, Boggan published a statement entitled "STATEMENT BY VICE CHANCELLOR DANIEL BOGGAN, JR., CONCERNING LEGAL ACTION AGAINST PERPETRATORS OF PEOPLE'S PARK VIOLENCE", in which he stated:

a. "[These individuals have] maliciously endangered public safety through continuing acts of violence intended to destroy University property and injure or intimidate people who use University facilities."

b."This small band of individuals, dissatisfied with the current plans for People's Park, are using fear and violence in an attempt to impose their will on the community."

c. [T]hese individuals intend to hold the campus and the community hostage, demanding the power to dictate public policy to everyone else."

In February, 1992, Boggan told the Bay Guardian that they "have stated that their goal is to sabotage the University facilities at People's Park. These individuals intend to hold the campus and the community hostage, demanding power to dictate public policy to everyone else."

In April, 1992, Boggan told the Berkeleyan:

"[A] few individuals have committed themselves to obstructing, through sometimes violent and destructive tactics, every attempt by the University and the city to restore a healthy environment at [People's Park]."

"[They] have continually shown wanton disregard for other people's rights and well-being [and] pose a serious threat to public safety that cannot be ignored."

"These individuals have at times been joined in acts of mob violence by opportunists seeking excitement or the spoils of looting".

On or about July 9, 1992, Boggan sent a letter to Dr. Agi E. Ban in which he stated: "These individuals stated that their goal was to sabotage University facilities at People's Park and to undermine the agreement between the University and the City.... Unable to alter the consensus through debate and reasoned discourse, they resorted to the use of fear and violence to impose their will on the community."

STATEMENTS OF CHRISTINE HELWICK

In March, 1992, Helwick, stated to a journalist of the East Bay Express that they "have a history of violent conduct."

In June, 1992, Helwick stated to a journalist of the San Francisco Weekly that they had undertaken "a deliberate, violent campaign to hinder the University's ability to transition this property into a park."

STATEMENTS OF JESUS MENA

On January 10, 1992, Mena distributed a circular to the general public and members of the press in which he made the following statements:

a. They have engaged in a "campaign of destruction and violence directed against University of California at Berkeley facilities, students, and employees - - as well as park and community users".

b. They "have repeatedly issued public statements threatening a guerilla campaign of attrition and retribution. . . and monkey wrenching of tools and equipment".

On March 25, 1992, Mena distributed a circular to the general public and members of the press in which he made the following statements:

a. They "have committed themselves to obstructing,

through sometimes violent and destructive tactics, every attempt by the University and the City [of Berkeley] to restore a healthy environment at the park."

b. They "have continually shown wanton disregard for other people's rights and well-being [and] pose a serious threat to public safety that cannot be ignored."

c. They are "perpetrators of violent and destructive acts [in People's Park]."